UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 597363 DOCUMENT NO. 130-36-8409 D1
Issued to: John L. PATTON

RULING ON PETITION TO RE-OPEN HEARING
UNITED STATES COAST GUARD

2488

John L. PATTON

This petition has been taken in accordance with 46 U.S.C. §7701 and 46 C.F.R. Part 5, Subpart I.

By his order dated 10 June 1988, an Administrative Law Judge of the United States Coast Guard at Philadelphia, Pennsylvania, suspended Appellant's license and document for a period of three months, remitted on six months probation upon finding proved the charge of misconduct. The specification supporting the charge of misconduct alleged that Appellant, while serving under the authority of his above-captioned license and document, aboard the T/V CHEMICAL PIONEER, did, on 3 December 1987, wrongfully direct and control said vessel, which was engaged in a coastwise voyage. Subsequent to the Administrative Law Judge's Decision and Order, the Appellant filed a notice of appeal on 21 July 1988. Subsequent to the hearing, Appellant received evidence from the U.S. Coast Guard (a copy of correspondence from Chief, Regional Examination Center, Marine Safety Office, Baltimore, MD., on the subject of docking masters and pilotage requirements) which was not available at the time of the hearing. Consequently, on 23 November 1988, Appellant filed a petition to reopen the hearing on the basis of the newly discovered evidence, pursuant to 46 C.F.R. §5.603. This was supplemented by a letter dated 20 January 1989.

Appearance: Timothy D. Persons, Esq., Krusen Evans & Byrne, Suite 1100, Curtis Center, Independence Square West, Sixth & Walnut Streets, Philadelphia, PA 19106, (215) 923-4400.

FINDINGS OF FACT

Appellant was the holder of a Merchant Mariner's License No. 587363 and a Merchant Mariner's Document No. 130-36-8409 D1 on 3 December 1987. Appellant's license authorized him to serve as Chief Mate of Steam or Motor Vessels of any gross tons upon Oceans; Radar Observer (unlimited); First Class Pilot of Steam or Motor Vessels of any gross tons, upon Lake Ontario as far East as Cape Vincent. On 3 December 1987, Appellant served aboard the T/V CHEMICAL PIONEER, as the undocking master as the vessel was moved from her berth at the Sun Oil Company Dock, Marcus Hook, PA., to

the stream of the Delaware River where he was relieved by a river pilot. In his capacity as undocking master, the Appellant gave orders to the vessel's helm, engine, and assisting tugs.

BASES OF APPEAL

The Appellant, in his Petition to Reopen the Hearing, dated 23 November 1988, asserts that:

The hearing should be reopened because the Appellant obtained newly discovered evidence subsequent to the hearing relevant to seminal issues, such evidence demonstrating an inconsistent and unfair application of pilotage statute and policy to Appellant.

OPINION

I

Appellant argues that pursuant to the provisions of 46 C.F.R. §5.601, et seq., the hearing must be reopened in order to consider "newly discovered evidence" consisting of official correspondence from the U.S. Coast Guard Marine Safety Officer, Baltimore, MD. Appellant urges that his evidence reflects that docking masters do not require a Federal pilot license and that a docking master's experience is not considered germane to pilot licensing requirements. Appellant contends that this evidence is relevant in demonstrating the inequitable application of statute and policy by the Coast Guard relating to docking pilots. Appellant further asserts that two previous similar cases considered by the same Administrative Law Judge were dismissed upon receipt of the same evidence obtained by Appellant.

The Investigating Officer urges that the petition to reopen the hearing should not be granted because the newly discovered evidence is not relevant or determinative in the instant case. The Investigating Officer stated in page 1 of the GOVERNMENT'S RESPONSE IN OPPOSITION TO RESPONDENT'S PETITION TO REOPEN THE HEARING that:

> 1. The Decision in the Patton case was based on the clear and unambiguous language expressed in 46 USC 8502. The alleged confusion in Coast Guard policy played no part in the decision, and therefore, the new evidence could not affect the outcome of this hearing.
> 2. The new evidence does not establish a Coast Guard policy but only addresses the particular facts of a license application filed by [a license applicant in an unrelated case].

The Investigating Officer asserted further that the new evidence would have had no bearing on the outcome of the case.

I concur with the Appellant there is sufficient reason to reopen the hearing based on the evidence discovered subsequent to the hearing.

The decision of whether to reopen the hearing is guided by the provisions of 46 C.F.R. Part 5, Subpart I and the test in Appeal Decision 2357 (GEESE). That test requires a showing that:

a. The evidence was not known at the time of the hearing, and could not have been known through use of due diligence; and,

b. The evidence would probably produce a result more favorable to the Appellant.

The Appellant has met both of these tests. The Appellant has demonstrated that obviously the correspondence was not available at the time of the hearing. The date of the correspondence in issue (3 November 1988) post-dates the hearing by almost 9 months. It simply was not in existence at the time f the hearing which was held on 8 March 1988. Additionally, the Appellant has demonstrated that this evidence would probably result in a more favorable decision. In the two factually similar cases decided concurrently on 5 January 1989 (U.S. v. License No. 006342, issued to DEAN BRUCH and License No. 584859, issued to JAMES RAY MOTIGUE) the same Administrative Law Judge dismissed the charges and specifications based on the same evidence cited by the Appellant in the instant case. The Administrative Law Judge, in that case, stated:

> [In] the very least the comments of the Chief of the Regional Examination Center would appear to support the respondent's claims that the maritime industry has not been provided with a cohesive Coast Guard wide policy regarding the licensing of docking masters...The state of law today is marked by confusion which urgently demands clarification.

Administrative Law Judge Decision & Order dated 5 January 1989 in the case of U.S. v. Licenses issued to DEAN BRUCH and JAMES RAY MOTIGUE, supra, pp. 18-21.

Based on the foregoing, it is clear that the evidence had a direct, beneficial impact on a factually similar case heard before the same Administrative Law Judge, and in all probability would have a similar impact on the instant case. Accordingly, the petition for a rehearing must be granted.

CONCLUSION

The evidence discovered by Appellant subsequent to the hearing was not in existence at the time of the hearing and is of significant relevance and importance to favorably affect the outcome of the case.

ORDER

Appellant's petition to reopen the hearing is GRANTED. The Administrative Law Judge is directed to WITHDRAW the original decision and render a new decision based upon the record of the original hearing and any new or additional evidence received.

CLYDE L. LUSK, JR.
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 17th day of July, 1989.